CEMPAKA FINANCE BHD

v.

HO LAI YING & ANOR

FEDERAL COURT, PUTRAJAYA
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
PAJAN SINGH GILL FCJ
[CIVIL APPEAL NO: 03-1-2004 (W)]
7 MARCH 2005

CIVIL PROCEDURE: *Summary judgment - Principles applicable - Burden of proof - Certificate of indebtedness, conclusive nature and extent of - Whether plaintiff/appellant excused from adducing proof of debt - Whether summary judgment ought to be granted*

CONTRACT: *Claim for moneys lent - Certificate of indebtedness - Conclusive nature and extent of - Whether plaintiff/appellant excused from adducing proof of debt*

Leave to prosecute this appeal was granted by this court upon the following two questions: (i) whether a certificate of indebtedness issued in accordance with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein, is final and conclusive evidence of the amount in the absence of any manifest error on the certificate; and (ii) whether apart from producing a certificate of indebtedness pursuant to the contract which provided that the certificate was final and conclusive of the matters stated therein, the plaintiff/appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment. The appellant, under a loan agreement, had granted the 1st respondent a fixed loan of RM1.5 million, and in consideration, the 2nd respondent had signed a guarantee agreement on the same date. The 1st respondent defaulted and the appellant consequently filed a suit against both defendants/ respondents in the High Court. Thereafter, the appellant filed a summons in chambers under O. 14 Rules of the High Court 1980 ('RHC') for summary judgment, which was granted by the senior assistant registrar. The respondents appealed to the judge in chambers, who upheld the registrar's decision. On further appeal by the respondents, the Court of Appeal reversed the decision of the High Court. The central issue canvassed before the judge in

chambers related to the two questions postulated, which concerned specifically the certificate of indebtedness found in cl. 27 of the loan agreement and in cl. 7.03 of the guarantee agreement. The appellant had relied on the two clauses to establish the conclusiveness of the certificate of indebtedness in support of its application for summary judgment under O. 14 RHC. In the present appeal against the decision of the Court of Appeal, the appellant submitted that: (a) the Court of Appeal had erred in law in not giving effect to the principles relating to summary judgment applications set out in the Federal Court case of *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* and requiring further proof from the appellant of the respondents' indebtedness; and (b) the Court of Appeal had erred in law in not giving effect to cl. 27 of the loan agreement entered into between the appellant and the 1st respondent, and cl. 7.03 of the guarantee agreement between the appellant and the 2nd respondent, described as the conclusive evidence clauses.

Held (allowing the appeal)
Per Steve Shim CJ (Sabah & Sarawak):

(1) In the instant case, the Court of Appeal had put the burden on the plaintiff to prove his case in an O. 14 application. With respect, that could not be the correct proposition of law. In an application under O. 14 RHC, the burden is on the plaintiff to establish the following conditions: (i) that the defendant must have entered an appearance; (ii) that the statement of claim must have been served on the defendant; and (iii) that the affidavit in support must comply with r. 2 of O. 14 RHC in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim. Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite (*National Company for Foreign Trade v. Kayu Raya Sdn Bhd* folld). The Court of Appeal, in reversing the burden of proof, had misapplied the relevant principles relating to an application for summary judgment under O. 14 RHC. (para 4)

(2) The Court of Appeal's position that the conclusiveness of the certificate of indebtedness was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the correctness of the amount claimed, went against the

entrenched principles enunciated in Citibank *N.A v. Ooi Boon Leong & Ors*, which established firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed. In the instant case, the relevant cls. 27 and 7.03 of the loan agreement and guarantee agreement respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England. The certificate of indebtedness, issued in accordance with the aforesaid cls. 27 and 7.03, was lucid enough. There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. (paras 6 & 7)

(3) In the circumstances and given the authorities cited, the answer to the first question was in the affirmative whereas the second question had to be answered in the negative. Having considered the questions in the context of the established facts, it was appropriate to allow this appeal with costs. (para 7)

Bahasa Malaysia *translation of headnotes*

Kebenaran merayu telah diberikan oleh mahkamah ini atas persoalan-persoalan berikut: (i) sama ada sijil keberhutangan yang dikeluarkan mengikut peruntukan nyata kontrak yang memperuntukkan bahawa sijil tersebut adalah muktamad dan konklusif tentang butir-butir yang dinyatakan didalamnya, merupakan keterangan muktamad dan konklusif mengenai amaun jika tiada kesilapan nyata pada sijil tersebut; dan (ii) sama ada, selain dari mengemukakan sijil keberhutangan berdasarkan kontrak yang memperuntukkan sijil sebagai muktamad dan konklusif mengenai butir-butir yang dinyatakan di dalamnya, seorang plaintif/perayu dalam suatu permohonan penghakiman terus juga menanggung obligasi untuk mengemukakan penyata akaun untuk membuktikan hutang. Perayu telah memberikan pinjaman tetap kepada responden pertama berjumlah RM1.5 juta di bawah suatu perjanjian pinjaman, dan sebagai balasan responden kedua telah menandatangani perjanjian gerenti pada tarikh yang sama. Responden pertama mungkir dan berikutnya perayu memfail guaman terhadap kedua-dua defendan/responden di Mahkamah

A Tinggi. Perayu kemudian memfailkan permohon saman dalam kamar di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk penghakiman terus, di mana permohonan telah dibenarkan oleh Penolong Kanan Pendaftar. Responden merayu kepada hakim dalam kamar, tetapi keputusan Pendaftar telah disahkan oleh
B hakim. Bagaimanapun, ekoran rayuan lanjut responden, keputusan Mahkamah Tinggi telah diakas oleh Mahkamah Rayuan. Secara khusus, isu utama yang dihujahkan di hadapan hakim dalam kamar berkaitan kedua-dua persoalan diatas adalah menyentuhi sijil keberhutangan yang diperuntukkan oleh per. 27 perjanjian
C pinjaman dan per. 7.03 perjanjian gerenti. Perayu bergantung kepada kedua-dua perenggan ini bagi menyokong permohonan penghakiman terusnya di bawah A. 14 KMT. Dalam rayuan semasa terhadap keputusan Mahkamah Rayuan, perayu berhujah bahawa: (a) Mahkamah Rayuan khilaf di sisi undang-undang kerana
D gagal memberi kesan kepada prinsip berkaitan permohonan penghakiman terus seperti yang diperkatakan Mahkamah Persekutuan dalam kes *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* dan dalam meminta perayu mengemukakan bukti lanjut mengenai keberhutangan responden; dan (b) Mahkamah
E Rayuan telah khilaf di sisi undang-undang kerana tidak memberi kesan kepada per. 27 perjanjian pinjaman yang dimasuki oleh perayu dan responden pertama, serta per. 7.03 perjanjian gerenti yang dimasuki oleh perayu dan responden kedua, di mana kedua-duanya adalah merupakan perenggan-perenggan keterangan
F konklusif.

Diputuskan (membenarkan rayuan)
Oleh Steve Shim KH (Sabah & Sarawak):

G **(1)** Dalam kes semasa, Mahkamah Rayuan telah meletakkan beban ke atas plaintif untuk membuktikan kesnya di bawah permohonan A. 14. Dengan hormat, itu bukanlah satu cadangan undang-undang yang betul. Dalam suatu permohonan A. 14 KMT, beban adalah atas plaintif untuk
H membuktikan perkara-perkara berikut: (i) bahawa defendan telah memasukkan kehadiran; (ii) bahawa pernyataan tuntutan telah diserahkan kepada defendan; dan (iii) bahawa afidavit sokongan telah mematuhi k. 2 A. 14 KMT, dalam ertikata ia harus mengesahkan faka-fakta yang menjadi asas tuntutan dan
I menyatakan kepercayaan deponen bahawa tidak wujud pembelaan terhadap tuntutan. Sebaik sahaja syarat-syarat ini dipenuhi, beban akan berpindah kepada defendan bagi membangkitkan isu yang boleh dibicarakan. Undang-undang

berkaitan hal ini sudahpun mantap (*National Company for Foreign Trade v. Kayu Raya Sdn Bhd* diikuti). Mahkamah Rayuan, dalam menterbalikkan beban pembuktian, telah melaksanakan dengan salah prinsip-prinsip relevan berkaitan permohonan penghakiman terus di bawah A. 14 KMT.

(2) Pendirian Mahkamah Rayuan bahawa kemuktamadan sijil keberhutangan hanya mengikat pihak-pihak dan bahawa mahkamah masih perlu menentukan sama ada keterangan yang mencukupi dikemukakan untuk membuktikan kuantum serta kebetulan amaun yang dituntut, telah melanggar prinsip kukuh yang diperkatakan dalam *Citibank N.A v. Ooi Boon Leong & Ors*, yang menetapkan dengan tegasnya tentang skop dan sifat kemuktamadan sijil keberhutangan. Sijil keberhutangan berfungsi dalam bidang undang-undang 'adjectival', sekaligus melepaskan plaintif dari mengemukakan bukti hutang sambil memindahkan beban ke atas defendan untuk menyangkal amaun yang dituntut. Dalam kes semasa, per. 27 dan 7.03 yang masing-masing berkaitan dengan perjanjian pinjaman dan perjanjian gerenti amat jelas. Klausa seperti ini adalah diambil sebagai klausa keterangan muktamad, di mana ia telah diputuskan sebagai sah dan mengikat oleh mahkamah-mahkamah di Australia dan England. Sijil keberhutangan yang dikeluarkan mengikut per. 27 dan 7.03 adalah cukup jelas. Tiada suatu apapun yang menunjukkan bahawa telah berlaku suatu kesilapan manifest pada permukaan sijil, atau bahawa satu penipuan telah dilakukan di situ.

(3) Dalam halkeadaan yang wujud dan mengambilkira autoriti-autoriti yang dihujah, jawapan kepada persoalan pertama adalah berbentuk afirmatif sementara persoalan kedua harus dijawab secara negatif. Mempertimbang persoalan-persoalan dalam konteks fakta-fakta yang dikemukakan, rayuan sewajarnya dibenarkan dengan kos.

Case(s) referred to:

Bank of Commerce (M) Bhd v. Tan Boon Soon & Anor [1995] 1 CLJ 69 HC ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(foll)***

D & C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd [1990] 2 CLJ 58; [1990] 1 CLJ (Rep) 752 HC ***(refd)***

Dobbs v. National Bank of Australiasia [1953] 53 CLR 643 ***(refd)***

A *National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC* ***(foll)***
Supreme Leasing Sdn Bhd v. Dior Enterprises & Ors [1990] 2 MLJ 36 ***(refd)***

Legislation referred to:
B Rules of the High Court 1980, O. 14

For the appellant - K Anantham (Chee Yoke Yung & Nadrah Mohamed with him); M/s Shatar Tan & Chee
For the respondent - SL Tan; M/s SL Tan & Assoc

C *Reported by Suresh Nathan*

JUDGMENT

D **Steve Shim CJ (Sabah & Sarawak):**

[1] Leave to prosecute this appeal was granted by this court on 23 March 2004 upon the following two questions:

1. Whether a certificate of indebtedness issued in accordance
E with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein is final and conclusive evidence of the amount in the absence of any manifest error on the certificate;

2. Whether apart from producing a certificate of indebtedness
F pursuant of the contract (sic) which provided that the certificate was final and conclusive of the matters stated therein, the appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment.

G **[2]** As a preliminary note, we should mention that by a vesting order dated 22 December 2000, the business of Cempaka Finance Bhd (the appellant herein) was taken over by United Finance Bhd which in turn, on 25 June 2001, changed its name to Southern Finance Bhd. Under a loan agreement dated 17 July 1996, the
H appellant agreed to grant the 1st respondent a fixed loan of RM1.5 million. In consideration, the 2nd respondent signed a guarantee agreement on the same date. The 1st respondent defaulted. In consequence, the appellant filed a suit against both respondents in the High Court on 29 May 1998. Thereafter, on
I 19 April 1999, the appellant filed a summons in chambers under O. 14 Rules of the High Court 1980 for summary judgment. The matter came before the senior assistant registrar who, on 17

August 1999, granted an order in terms of the application. The respondents then appealed to the judge in chambers. The judge upheld the decision of the senior assistant registrar. On further appeal by the respondents, the Court of Appeal reversed the decision of the High Court.

[3] It seems clear that the central issue canvassed before the judge in chambers relates to the questions now postulated for our consideration. The questions concern specifically the certificate of indebtedness found in cl. 27 of the loan agreement and in cl. 7.03 of the guarantee agreement. Now cl. 27 stipulates:

> If and when the loans shall be withdrawn or revoked and/or the said account or accounts whatsoever in respect thereof shall be closed, a statement by the Director, General Manager, Manager, Assistant Manager, Sub-Manager, Secretary, Accountant or any other duly authorized officer or agent of the Lender for the time being as to the amount of such balance and the money and liabilities for the time being incurred or due to the Lender by or from the Borrower(s) shall be accepted by the Borrower(s) and/ or any person or persons deriving title from the Borrower(s) and/ or the successors in title and assigns of the Borrower(s) as final and conclusive evidence for all purposes whatsoever including for purposes of legal proceedings.

And cl. 7.03 stipulates:

> It is hereby agreed that any admission or acknowledgment in writing by the Borrower(s) or any authorized person on behalf of the Borrower(s) or a statement of account in writing showing the indebtedness of the Borrower(s) in relation to the subject matter of this Agreement duly certified by an authorized officer of the Lender shall be binding and conclusive against the Guarantor(s) and his heirs, executors, personal representatives and successors.

[4] In this connection, the appellant had relied on the two clauses to establish the conclusiveness of the certificate of indebtedness in support of its application for summary judgment under O. 14 Rules of the High Court 1980. Therein, the High Court held that the certificate of indebtedness, exh. P3, certified by a duly authorised officer of the appellant was binding as to quantum and liability relying, it seems, on the case of *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690. It further held that there was no manifest error on the face of the said certificate nor was there any fraud. As such, there were no triable issues involved. The application was therefore granted in terms. However, on appeal by the respondents, the

A Court of Appeal took a different stand. That stand has been attacked in this Court by the appellant on two fronts. The first is that the Court of Appeal has erred in law in not giving effect to the principles relating to summary judgment applications set out in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd.* [1984] B 2 CLJ 220; [1984] 1 CLJ (Rep) 283 and requiring further proof from the appellant of the respondents' indebtedness. This is obviously directed at the following passage of its judgment:

> Thus, a plaintiff would be entitled to obtain summary judgment C without trial if he can prove his case clearly which to us would mean that the plaintiff has to establish the existence of certain facts and must prove that those facts exist before the court can determine the issue as to whether the defendant has a defence or has raised an issue against the claim which ought to be tried.

D Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O. 14 application. With respect, that cannot be the correct proposition of law. In an application under O. 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered E appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r. 2 of O. 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim. (See *Supreme Leasing Sdn Bhd v. Dior* F *Enterprises & Ors* [1990] 2 MLJ 36.) Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite. In *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283, the Federal Court has stated thus:

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> We think it appropriate to remind ourselves once again that in every application under Order 14, the first considerations are (a) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order H 14, the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.

> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the Court why judgment should not be given against him."

The proposition of law enunciated by the Federal Court in *National Company (supra)* has been applied in numerous cases. We accept the correctness of that proposition. In reversing the burden of proof as the Court of Appeal in the instant case has done, it has, in our respectful view, misapplied the relevant principles relating to an application for summary judgment under O. 14 Rules of the High Court 1980.

[5] We now turn to the second broadside launched by the appellant. Here, the appellant contends that the Court of Appeal has erred in law in not giving effect to cl. 27 of the loan agreement entered into between the appellant and the 1st respondent and cl. 7.03 of the guarantee agreement between the appellant and the 2nd respondent, described as the conclusive evidence clauses. This relates to the following passage in the judgment of the Court of Appeal which states:

> The sole question before us is whether the respondent had sufficiently established their case against the appellants, namely, that the appellants as at 29th November 1997 owed the respondent the said sum of RM1,554,019.74. We do not think so. Exhibit P3 would only be conclusive evidence if it had been illustrated in the respondent's affidavit in support of their application for summary judgment as to how the sum mentioned therein was arrived at. It is our view that the mere production of exhibit P.3 was insufficient to show that the respondent had clearly established that the said sum was due and owing. The court cannot just assume that the amount shown therein is correct. No documentary evidence such as in the form of monthly statement of accounts and the amount of interest imposed on the monies released were introduced by the respondent. Under the circumstances, we cannot come to the conclusion that the respondent had clearly proven their case. ... All the said documents showed is that the said facility was granted to the first appellant with the second appellant as the guarantor. What we were gravely concerned with is whether the evidence introduced up to now is sufficient *prima facie* to establish the respondent's case. The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act,

> 1950. In accordance with section 101 of the Act, the legal burden of establishing that the said sum stated in exhibit P3 is owing from the appellants to the respondent lie on the latter. The conclusiveness of exhibit P.3 is binding only upon the parties. The court would still have to determine whether sufficient evidence has been adduced to prove the quantum and correctness of the amount claimed by the respondent.

The Court of Appeal thereafter cited in support the High Court case of *Bank of Commerce (M) Bhd v. Tan Boon Soon @ Tan Po Lo trading as Messrs. Syarikat Soon Tatt Trading & Anor* [1995] 1 CLJ 69.

[6] Although the case of *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690 (CA), was relied on by the High Court in holding a certificate of indebtedness to be binding unless manifest error on the face of it or fraud is shown, the Court of Appeal in the instant case, seems to place no significance on this. Nor has it considered the fact that in *Chen Heng Ping* the court was able to distinguish the factual peculiarities in Bank of Commerce. It was a case where an error was manifested on the face of the certificate of indebtedness because the guarantee agreement had limited the guarantor's liability to RM140,000 whereas the suit had claimed for RM259,000. Indeed, the Court of Appeal in Chen Heng Ping cited with approval the observation expressed by VC George J in *D & C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd* [1990] 2 CLJ 58; [1990] 1 CLJ (Rep) 752 when he said:

> ... it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the 1st defendant.
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> In the instant case, there is such a certificate of indebtedness under the hand of an authorised officer of the plaintiff bank. The judgment of Shankar J in *MIMB v. G & C Securities* (unreported) and the judgment of *Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd* [1988] 1 MLJ 462, 463 provided authority for the proposition that such a certificate is indeed binding unless there is manifest error.

This observation appeared to has escaped the attention of the Court of Appeal in the present case. In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness exh. P3 was binding only upon the parties and that the court would still have to determine whether sufficient

evidence had been adduced to prove quantum and the correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 when he said *inter alia*:

> We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the R.S.C. Order 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[7] In the instant case, the relevant cls. 27 and 7.03 of the loan agreement and guarantee agreement respectively are sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England. In *Dobbs v. National Bank of Australiasia* [1953] 53 CLR 643, the Australian Court made the following observation which we think is instructive:-

> ... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

The certificate of indebtedness, exh. P3, issued in accordance with cls. 27 and 7.03 aforesaid, is lucid enough. There is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown. In the circumstances and given

A the authorities cited, we take the firm view that the answer to the first question must be in the affirmative whereas the second question has to be answered in the negative. Having considered the questions in the context of the established facts, it is appropriate, we think, to allow this appeal with costs. Deposit to
B the appellant to account of taxed costs.

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